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Actions Against a Village

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summary proceeding to enforce his rights in a situation where he has unreasonably permitted large sums of rental arrears to accrue.[193] Moreover, where a tenant can show bad faith on the part of the landlord, as in the case where he attempts to circumvent eviction procedures and use the nonpayment to evict a tenant from a rent-controlled apartment, or where some other basis for equitable estoppel is present, the *Antillean* decision suggests that the landlord will be denied recovery in the summary proceeding. In instances where the landlord's delay in bringing the summary proceeding is unavoidable, however, Judge Kassal indicates that the three-month rule need not be applied.[194]

In view of the history of landlord-tenant controversies and the confusion surrounding the adoption of the three-month rule, the interpretation given by Judge Kassal seems most equitable. Arbitrary and inflexible rules too often result in injustice. In light of the likelihood of abuse in cases where the landlord has delayed commencing the summary proceeding, the burden of proving reasonable diligence is properly placed upon him. On the other hand, the primary purpose of the three-month rule is to preserve the integrity of the summary proceeding, and, therefore, the rule should not be interpreted to automatically inure to the benefit of the tenant and thus bar the landlord from recovery.

DOLE V. DOW CHEMICAL CO.

Actions Against a Village

CPLR 9801[195] bars any action in negligence against a village unless it is served with a notice of claim pursuant to section 50-e of the Gen-

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193 The language employed by the court in *Maxwell*, in establishing the three-month rule, suggests that the three-month period governing the commencement of summary nonpayment proceedings is similar to a statute of limitations. Thus, when a landlord attempts to recover more than three months rent in a single proceeding, it will be deemed to be for rent which accrued during the three-month period immediately preceding the commencement of the action. Consequently, he will be barred from collecting an amount in excess of three months rent. Yet, when faced with the problem, the courts have followed one of three procedures, all in the name of the three-month rule. They have either (1) dismissed the proceeding altogether with leave to commence an action at law (*Gramford* and *Romero*); (2) dismissed the proceeding without prejudice to the commencement of a summary proceeding solely for three months rent or a plenary action at law for all rent due (*Stokes*); or (3) having excused the delay, permitted recovery for more than three months rent (*Malek* and *United Artists*).

194 *See* note 186 *supra*.

195 CPLR 9801 provides:

> 1. No action shall be maintained against the village for a personal injury or injury to property alleged to have been sustained by reason of the negligence or wrongful act of the village or of any officer, agent or employee thereof, unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law.

eral Municipal Law.[196] Compliance with the ninety-day notice provision of the General Municipal Law is a condition precedent to the commencement of any tort action against a municipality.[197] Notwithstanding service of a timely notice of claim, in certain instances a plaintiff may never have an opportunity to litigate unless the municipality had been served with a notice of defect within a reasonable time prior to the accident.[198] Accordingly, section 6-628 of the Village Law imposes this additional condition precedent to the maintenance of any action for damages sustained as the result of a defective, snow-covered, or icy road, street, sidewalk, or bridge.[199]

The failure of an original plaintiff to furnish the required notice of claim, although fatal to the main action against the municipality, will not defeat a third-party claim by a co-tortfeasor against the same governmental unit.[200] Compliance with section 50-e of the General

2. Every such action shall be commenced pursuant to the provisions of section fifty-i of the general municipal law.

196 N.Y. GEN. MUNIC. LAW § 50-e (McKinney 1965) reads in pertinent part:

1. In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, . . . the notice shall comply with the provisions of this section and it shall be given within ninety days after the claim arises.

2. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

197 8 WK&M ¶ 9801.02; H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 70 (4th ed. 1973). The General Municipal Law also prescribes an abbreviated statute of limitations. Section 50-i provides that an action against a municipality in negligence "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based." N.Y. GEN. MUNIC. LAW § 50-i (McKinney 1965).

198 *See, e.g.*, N.Y. VILLAGE LAW § 6-628 (McKinney 1973). This statute has been adopted into the CPLR as section 9804.

199 CPLR 9804 provides:

No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to persons or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructive condition, or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of or to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

200 In Valstrey Serv. Corp. v. Board of Elections, 2 N.Y.2d 413, 141 N.E.2d 565, 161 N.Y.S.2d 52 (1957) (per curiam), the plaintiff in the principal action was injured upon stepping into a hole while entering an election booth. The defendant commenced a third-party action against the county for damages it might be obligated to pay the plaintiff. The Court of Appeals concluded that under the circumstances, no notice of claim was required to be served upon the county as a condition precedent to the maintenance of the third-party indemnification action.

In Accredited Demolition Constr. Corp. v. City of Yonkers, 37 App. Div. 2d 708, 324 N.Y.S.2d 377 (2d Dep't 1971) (mem.), the Second Department relied upon the holding in

Municipal Law is not a condition precedent to maintenance of the indemnification action. This distinction from the general rule arises since any claim which the third-party plaintiff may have against the governmental body is not asserted until the third-party plaintiff is made a defendant in the main action, a time, most often, long after the ninety-day period has expired.[201]

In *Barry v. Niagara Transit System, Inc.*,[202] the Supreme Court, Erie County, was confronted with the issue of whether the failure of a village to receive prior notice of defect, concededly barring suit by the original plaintiff,[203] would similarly bar a subsequent *Dole* indemnification claim against that village. In *Barry*, plaintiff, injured while exiting from a bus operated by Niagara, commenced an action against the company for negligent operation of the bus and for failure to provide a safe place to alight. The Village of Kenmore was made a co-defendant for its alleged failure to keep a street curb in repair and for failing to warn plaintiff of the unsafe condition. Since the required notice of defect had not been given, the action as to the village was subsequently dismissed. Nonetheless, Niagara then brought a third-party claim against the village for a *Dole* apportionment of any judgment recovered by the plaintiff against it. In dismissing Niagara's claim, the court refused to waive the notice of defect requirement and thereby "permit indirectly what could not be done by the plaintiffs themselves"[204] in the principal action.

The court's holding finds support in the theoretical underpinnings of both notice statutes. The notice of claim requirement seeks, as its primary function, "to assure the [municipality] an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available."[205] Designed solely for the benefit of the municipality, notice of claim may be waived without offending legal theory or public

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Valstrey and permitted an action for indemnification to be maintained against the City of Yonkers even though a notice of claim had not been filed. *See also* Fontana v. Town of Hempstead, 18 App. Div. 2d 1084, 239 N.Y.S.2d 512 (2d Dep't 1963) (mem.); Zillman v. Meadowbrook Hospital, 73 Misc. 2d 726, 342 N.Y.S.2d 302 (Sup. Ct. Nassau County 1973); 48 ST. JOHN'S L. REV. 199, n.204 (1972). For a discussion of the *Zillman* case by Professor David D. Siegel, *see* 7B MCKINNEY'S CPLR 3019, supp. commentary at 239 (1974).

201 Shapiro, *Dole v. Dow and Problems It Created*, 171 N.Y.L.J. 28, Feb. 8, 1974, at 5, col. 2-3.

202 76 Misc. 2d 316, 351 N.Y.S.2d 250 (Sup. Ct. Erie County 1972), *aff'd mem.*, 42 App. Div. 2d 1035, 348 N.Y.S.2d 974 (4th Dep't 1973).

203 *See* Doremus v. Incorporated Village of Lynbrook, 18 N.Y.2d 362, 222 N.E.2d 376, 275 N.Y.S.2d 505 (1966); McCord v. Village of Walden, 38 App. Div. 2d 741, 349 N.Y.S.2d 344 (2d Dep't 1972) (mem.); Spina v. Switzer Contracting Co., 32 Misc. 2d 94, 221 N.Y.S.2d 442 (Sup. Ct. Nassau County 1961).

204 76 Misc. 2d at 318, 351 N.Y.S.2d at 252.

205 Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952).

policy.[206] By contrast, the notice of defect is an essential ingredient in establishing negligence on the part of the municipality.[207] Since the village may be deemed culpable only after the notice of defect has been received and a reasonable time to repair has elapsed, where no notice is given, it cannot become a tortfeasor.[208] As such, the rule of *Dole*, permitting an apportionment of damages among joint tortfeasors, cannot apply.

The Supreme Court, Erie County, has struck the chord which distinguishes the notice of claim and the notice of defect. While both are conditions precedent, the latter is a key element in defining actionable negligence. Consequently, no liability may rest on the village, be it through a *Dole* apportionment or otherwise, absent compliance with the notice of defect requirements.

Collection of Judgments

CPLR 1007 basically provides for the right to indemnification by way of impleader.[209] In *Adams v. Lindsay*,[210] the Supreme Court, Mon-

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206 N.Y. GEN. MUNIC. LAW § 50-e (McKinney 1965) allows for an extension of time where unyielding insistence on compliance with the ninety-day period would work hardship. The statute provides, in relevant part:

> 5. The court, in its discretion, may grant leave to serve a notice of claim within a reasonable time after the expiration of the time specified in subdivision one of this section in the following cases: (1) Where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier.

Furthermore, compliance with the notice of claim requirements of § 50-e are unnecessary in actions brought in equity. Fontana v. Town of Hempstead, 18 App. Div. 2d 1084, 239 N.Y.S.2d 512, 513 (2d Dep't 1963) (mem.). Additionally, courts have been willing to find a waiver of this condition where a municipality, through its own intransigence, has induced a plaintiff to rely on the sufficiency of an improperly drafted notice of claim until the ninety-day period has expired. Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952). *See also* Chikara v. City of New York, 21 Misc. 2d 446, 190 N.Y.S.2d 576 (Sup. Ct. Kings County 1959), *rev'd on other grounds*, 10 App. Div. 2d 862, 199 N.Y.S.2d 829 (2d Dep't 1960) (mem.).

See generally Note, *Notice of Claim in Negligence Actions*, 22 BKLYN. L. REV. 342 (1956); Note, *Late Filing of Claim Against City Where Claimant is Incapacitated*, 7 SYRACUSE L. REV. 337 (1956); Note, *Renewed Recommendations for Revision of Section 50-e of General Municipal Law*, 24 ST. JOHN'S L. REV. 318 (1950).

207 76 Misc. 2d at 319, 351 N.Y.S.2d at 253.

208 *See* King v. Incorporated Village of Lynbrook, 35 Misc. 2d 75, 229 N.Y.S.2d 840 (Sup. Ct. Nassau County 1962).

209 7B MCKINNEY'S CPLR 1007, commentary at 333 (1963); *see* WK&M ¶ 1007.01. The practice of impleader furnishes the means for a determination of primary and ultimate responsibility in one proceeding, thus avoiding a multiplicity of actions. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 94 (4th ed. 1973) [hereinafter cited as WACHTELL]. For a discussion of the development of indemnity in New York, see Note, Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185, 189-200 (1972).

210 77 Misc. 2d 824, 354 N.Y.S.2d 356 (Sup. Ct. Monroe County 1974). For a concise